Order of the Arizona Supreme Court Denying Motion for Rehearing

IN THE
SUPREME COURT
OF THE STATE OF ARIZONA

MARCH 7, 1979

SUPREME COURT
No. 4355

COURT OF APPEALS
No. 1 CA-CR 2977

MARICOPA COUNTY
No. CR 95002

STATE OF ARIZONA,

Appellee,

—v.—

ERLAND EARL BARTANEN,

Appellant.

The following action was taken by the Supreme Court of the State of Arizona on March 6, 1979 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing—DENIED."
COPY OF Order Affirming Judgment enclosed herewith.

CLIFFORD H. WARD,

By PAT GOELLER,
Deputy Clerk

Order of the Arizona Supreme Court Affirming Judgment

IN THE
SUPREME COURT
OF THE STATE OF ARIZONA

No. 4355

STATE OF ARIZONA,

Appellee,

—v.—

ERLAND EARL BARTANEN,

Appellant.

Appeal from the Superior Court of Maricopa County
Number CR 95002

Honorable STANLEY Z. GOODFARB, *Judge*

ORDER AFFIRMING JUDGMENT
(Mandate)

The above cause was presented in your Court and was brought before the Court of Appeals, Division One, in the manner prescribed by law. By Order dated the 25th day of August, 1978, this cause was transferred to the Supreme Court.

This cause having been heretofore submitted, and the Court having duly considered same, and being now advised in the premises, files its opinion. It is accordingly ORDERED that the judgment of the trial court entered in the above-entitled cause be affirmed, to comply with the opinion of this Court, attached hereto.

DONE IN OPEN COURT this 30th day of January, 1979.

Opinion of the Arizona Supreme Court

IN THE
SUPREME COURT
OF THE STATE OF ARIZONA

IN BANC

No. 4355

THE STATE OF ARIZONA,

Appellee,

—v.—

ERLAND EARL BARTANEN,

Appellant.

Appeal from the Superior Court of Maricopa County
Cause No. CR-95002

THE HONORABLE STANLEY Z. GOODFARB, *Judge*
AFFIRMED

CAMERON, *Chief Justice*

Defendant Erland Earl Bartanen was convicted by a jury and adjudged guilty in the Superior Court of Maricopa County of five counts of commercial exhibition of obscene films in violation of A.R.S. § 13-532. We have jurisdiction pursuant to Rule 47(e)(5), Rules of the Supreme Court, 17A A.R.S.

Defendant raises the following questions on appeal:

1. Was the search warrant's description of the items to be seized sufficiently particular to withstand a motion to suppress?

2. Did the affidavit and the warrant fail to establish probable cause to believe that the films were obscene?

3. Did the definition of "prurient interest" employed at the trial constitute reversible error?

4. Did the change in definition of "prurient interest" from the grand jury proceedings to that employed at trial deny defendant fair notice of the charges against him?

5. Was the application of contemporary state standards to determine what is "patently offensive" error?

6. Did an alleged violation of a stipulation during the State's closing argument constitute reversible error?

The Owl Bookstore was located in Phoenix and was owned and operated by the defendant. The Owl Bookstore sold many different kinds of printed material, including many non-obscene items. In the back of the Owl Bookstore were located several coin-operated "videomatic" booths in which the allegedly obscene films were exhibited. A person wishing to view the film would enter an individual booth and on deposit of a quarter would see two minutes of the film. To see an entire film would require a deposit of five or six quarters.

A Phoenix city magistrate, after considering the affidavit of the investigating officer and after viewing the five films, issued a warrant for the seizure of the films. As a result, defendant was indicted by the Maricopa County Grand Jury; a jury trial was held and defendant was convicted on all five counts from which convictions and judgments he appeals.

THE SUFFICIENCY OF THE DESCRIPTION IN THE SEARCH WARRANT OF ITEMS TO BE SEIZED

The Phoenix Police Department apparently uses form affidavits to support requests for search warrants in obscenity cases and here there was an affidavit for each film. The affidavits recited that a duly commissioned police officer accompanied by a named Phoenix magistrate viewed motion pictures and that the films "contained explicit and patently offensive representations of ultimate sexual acts." A list of specific sexual acts on the forms were checked off by the affiant. The affidavits further stated that the films "contained explicit and patently offensive representations or descriptions" of other sexual or excretory functions. The affidavits finally recited that the affiant "believes, based upon his personal observation of the above-described • • • films(s) and based upon his personal experience that the • • • film(s) is/are obscene as defined by § 13-531.01, Arizona Revised Statutes • • • ."

Neither the affidavits nor the warrant named the films by title. The affidavits and search warrant did, however, describe the place to be searched (the five booths) and the things to be seized (the films in the booths). The warrant itself described the films to be seized as follows:

"1) one 8mm film being displayed in booth #3 (only Film)

2) the only 8mm film being displayed in booth #9

3) the only 8mm film being displayed in booth #19

"4) the only 8mm film being displayed in booth #1

5) the only 8mm film being displayed in booth #18. and which is/are obscene as defined by Section 13-531.01 Arizona Revised Statutes, as amended 1974 • • •."

The affidavits, warrant and return of warrant were all dated and signed the same day, 30 September 1976.

It is defendant's contention that the affidavits and search warrant are defective in that they did not sufficiently describe the items to be seized. We disagree. The Fourth Amendment to the United States Constitution reads as follows:

> "No warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

We believe that the affidavits and warrant "particularly" described "the place to be searched" and the "things to be seized." The warrant was timely, only a few hours having elapsed from the viewing of the films by the magistrate and the signing of the affidavit by the officer to the service of the warrant. The trial judge noted that there was no evidence that the films in the booths had been switched. The warrant left no doubt for the serving officer as to what was to be seized and where the items to be seized were to be found.

Defendant contends, however, that because of the danger of prior restraint of protected expression and the history of abuse of the search and seizure power directed at unpopular expression, see Marcus v. Search Warrants, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961), "the constitutional requirement that warrants particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude * * *." Stanford v. Texas, 379 U.S. 476, 485, 85 S.Ct. 506, 511, 13 L.Ed.2d 431, 437 (1965). See also Roaden v. Kentucky, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973); Lee Art Theatre v. Virginia, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968); A Quantity of

Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964). We have no quarrel with defendant's citation of authority and the law contained therein. We do not believe, however, that they require that we reverse the judgments in this case. The failure to describe the films by their particular titles does not make the warrant unparticular as defendant contends. We agree that while it may have been the better practice to have described the films in greater detail and list the titles if known, it was not necessary where, as here, the warrant was served within a few hours of the viewing of the films in their particularly described location. We believe that the affidavits and warrant met the standards of the Fourth Amendment and the Arizona statute, A.R.S. §§ 13-1441, et seq.

To show that the warrant could have been more specific, defendant further contends that the return of the search warrant was much more detailed in its description of each film seized than the affidavit and warrant. It logically follows that the return of service of the warrant, in most instances, will be more detailed. A.R.S. § 13-1451, in effect at the time the warrant was served, required, as does the present statute A.R.S. § 13-3921, that the officer serving the warrant make and deliver a written inventory of the item taken pursuant to the warrant. This return, of necessity, will be more detailed. The courts will look, however, to the circumstances at the time the warrant was issued to determine its sufficiency and not to what occurs after the warrant is served. United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed.2d 210 (1948). We find no error.

DID THE AFFIDAVIT AND WARRANT SHOW PROBABLE CAUSE?

No search warrant shall be issued except upon probable cause. A.R.S. §§ 13-1443, 1444 (in effect at the time of the warrant); State v. Robertson, 111 Ariz. 427, 531 P.2d

1134 (1975). In the instant case, although the magistrate viewed the films before the issuance of the warrant, see Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), since his affidavits were not reduced to affidavit or recorded, we will not consider what his conclusions were in our determination of the sufficiency of the warrant. Robertson, supra.

Defendant contends that since the affidavit only asserts that the material contained "explicit and patently offensive representations" of certain sex acts and did not assert that the films appealed to the prurient interest or that they did not have any "serious literary, artistic, political or scientific value," there was no showing of probable cause. The affidavit did contain the statement that the films offended against the statute, but defendant contends that this was not enough. We do not agree.

An affidavit in support of a search warrant does not have to recite each element of a crime and negate defenses to the crime the items may be offered against. The affidavit need only show that the impartial magistrate, having focused "searchingly upon the question of obscenity," Heller, supra, had probable cause to believe that the material was obscene. We find no error.

The Definition of Prurient Interest

Defendant contends that the court in its instruction to the jury applied an overbroad definition of prurient interest. Although the statute, A.R.S. § 13-531.01(2), stated that an item is obscene when it "appeals to the prurient interest," it did not define the term "prurient interest," and the trial court instructed the jury over defendant's objection as follows:

"The term appeal to the prurient interest means to excite lustful thoughts, a shameful or morbid interest in sex or nudity, arouse sexual desires or sexually impure thoughts, inclined to or disposed to lewdness, having lustful ideas or desires.

* * * * *

"A prurient interest in sex is not the same as a candid, wholesome, or healthy interest in sex. Material does not appeal to the prurient interest just because it deals with sex or shows nude bodies. Prurient interest is an unhealthy, unwholesome, morbid, degrading or shameful interest in sex, a leering or longing interest. An appeal to the prurient interest is an appeal to sexual desire, not an appeal to sexual interest. An interest in sex is normal, but if the material appeals to an abnormal interest in sex, it can appeal to the prurient interest. * * *"

During their deliberations, the jury sent the following question to the trial judge:

"Under prurient interest—do all of these adjectives have to apply:

unhealthy
unholesome [sic]
morbid
degrading
shameful interest in sex
or only one of them.

"Check one—
——all ——only one."

In response, the trial court sent the jury the following response over the defendant's objection:

"To the Jury:

"With reference to the question, if you will reread instructions given on page 16 of the instruction which I gave, you will find I defined the term 'prurient interest' on that page. It is found in paragraphs 1 and 3 of page 16.

"The definition as used in those instructions uses descriptive terms which are set forth in the alternative. They do not require a showing of the fulfillment of all of the descriptive terms utilized.

"However, you should also remember that as to these particular instructions, you must consider them as a whole."

The statutes in effect at the time of the offense read as follows:

"§ 13-531.01. Definitions

"In this article, unless the context otherwise requires:

* * * * *

2. An item is obscene within the meaning of this article when:

(a) The average person, applying contemporary state standards would find that the item, taken as a whole, appeals to the prurient interest; and

(b) The item depicts or describes, in a patently offensive way, sexual activity as that term is described herein; and

(c) The item taken as a whole, lacks serious literary, artistic, political or scientific value."

Films and motion pictures are included within the statute's definition of "item." "Sexual activity" is defined as:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions, sadomasochistic abuse and lewd exhibition of the genitals."

A.R.S. § 13-532 makes it a crime to produce, publish or sell obscene items.

This statute, A.R.S. §§ 13-531, et seq., followed closely the United States Supreme Court in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and its constitutionality was upheld by our Court of Appeals in State v. Navarrette, 115 Ariz. 574, 566 P.2d 1050 (App. 1977). Its constitutionality is not questioned by defendant herein.

Although there appears to be no doubt that obscenity is not protected by the First Amendment, the United States Supreme Court has had continuing difficulty in the development and refinement of the verbal standards for obscenity. See, e.g., Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). Most writers have candidly admitted that a precise definition is impossible to obtain:

> "* * * Not only is obscenity incapable of a mathematically precise definition; it is also incapable of definition with the precision of many a good, usable legal formula. A definition of burglary as breaking and enter-

ing in the nighttime for the purpose of committing a felony has a flatly tangible quality to it. There is going to be no equivalent in the law of obscenity." John P. Frank, Obscenity: Some Problems of Values and the Use of Experts, 41 Washington Law Review 631, 633 (1966).

The Legal Panel Report in the Report of the Commission on Obscenity and Pornography noted:

"*Roth* also somewhat shifts the verbalization of what is 'obscene' from that utilized under [Regina v. Hicklin, L.R., 3 Q.B. 360 (1868)]. Under the earlier case, the test of the 'obscenity' of material dealing with sex was whether 'the tendency of the matter * * * is to deprave and corrupt.' Under *Roth* material dealing with sex may not be deemed 'obscene' * * * unless it 'appeals to the prurient interest.' This prurient-interest material is defined in the *Roth* opinion as material 'having a tendency to excite lustful thoughts.' It would appear that, in this particular respect, the *Roth* standard may be potentially somewhat more inclusive of material than the earlier *Hicklin* test, for it would perhaps be easier to find that material excites lust, as *Roth* requires, than to find that it actually tends to 'deprave and corrupt,' as *Hicklin* required." At 312.

The American Law Institute, in its tentative draft of the Model Penal Code, also proposed a definition of obscenity "in terms of appeal of the material rather than its tendency." ALI Model Penal Code, Tent. Draft No. 6, p. 29.

"Section 207.10—Obscenity

* * * * *

"(2) *Obscene Defined; Method of Adjudication.*

"A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. * * * Obscenity shall be judged with reference to ordinary adults * * *." ALI, Model Penal Code, Tentative Draft No. 6, 1 (1957).

Admittedly, some writers do not perceive the difference between "appeal" and "tendency" as being important. The Roth opinion itself found "no significant difference" between the ALI approach and other case law formulations focusing on tendency. Roth v. United States, supra, 345 U.S. at 487 n. 20, 77 S.Ct. at 1310, 1 L.Ed.2d at 1508 (1957). Professors Lockhart and McClure concluded that the court's resolution of the "prurient interest" problem was to adopt all common law tests of prurient interest and that the difference between "appeal" and "tendency" was not of constitutional significance. Lockhart and McClure, "Censorship of Obscenity: The Developing Constitutional Standards", 45 Minn. L.Rev. 5, 57 (1960).

The trial court herein used both the so-called "appeal" approach to obscenity, that is, does the material appeal to a morbid, shameful, disgusting, unhealthy, unwholesome, degrading interest in sex, as well as a "tendency" of the material to excite "lustful ideas or desires."

We believe the trial court correctly instructed the jury. A.R.S. § 13-531.01(2)(a) stated that an item is obscene when "taken as a whole [it] appeals to the prurient inter-

est." The statute also defines specifically the material that is to be considered obscene and the court instructed the jury pursuant to statute. The position taken by the trial court that an "appeal to the prurient interest" is to be judged by both the objective nature of the material and the human instincts which it tends to arouse is correct under the facts of this case. We believe therefore that the instructions, when read as a whole, provided the jury with an adequate and sufficient direction upon which they could reach a proper verdict based on the evidence before them. We find no error.

Change in Definition of Prurient Interest From Grand Jury Proceedings to Trial

During the presentation of the matter before the grand jury, the county attorney called an expert witness, Dr. Dean Mitchell, who was asked to give his opinion as to the films as well as to the definition of some of the words used in the statute. Dr. Mitchell stated to the jury: "I take prurient to mean an appeal to a shameful or morbid interest in nudity, sex or lewdness." Prior to trial, the defendant was provided with these portions of the grand jury transcript as part of discovery pursuant to Rule 15, Rules of Criminal Procedure, 17 A.R.S.

In its motion to strike and for mistrial, defendant contends that the definition of "appeal to prurient interest" employed at the grand jury proceedings was that contained in former A.R.S. § 13-531.01 and that since the prosecution employed a different definition at trial than that which was disclosed in pretrial discovery, the defendant was misled and denied fair notice of the charge.

Rule 13.2(a) of the Rules of Criminal Procedure provides:

"a. In General. The indictment or information shall be a plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged."

We believe the indictment was "sufficiently definitive" to inform the defendant of the offense charged. The definition given by Dr. Mitchell was opinion only and was not necessarily the law. The grand jury had the statute before it when it deliberated and viewed the exhibits and was able to find probable cause therefrom. Defendant not only did not have the right to rely on Dr. Mitchell's definition of prurient interest before the grand jury, but a review of the record indicates that defendant, in fact, did not rely on the doctor's testimony. The defense repeatedly objected to testimony which it felt did not comport with a constitutionally or statutorily proper definition of "prurient interest." It submitted its own proposed jury instructions to the trial court defining "prurient interest." It elicited testimony from its witnesses consistent with a proper charge and a proper defense. We find no error.

THE APPLICATION OF CONTEMPORARY STATE STANDARDS TO "PATENT OFFENSIVENESS"

A.R.S. § 13-531.01(2) states:

"An item is obscene within the meaning of this article when

(a) The average person, applying contemporary state standards would find that the item, taken as a whole, *appeals to the prurient interest;* and

(b) The item depicts or describes, in a *patently offensive* way, sexual activity as that term is described herein; and

(c) The item taken as a whole, lacks serious literary, artistic, political or scientific value." (Emphasis added)

The trial court instructed the jury that "appeal to prurient interest" and "patently offensive" must be judged by contemporary state standards:

"* * * [B]oth the terms 'appeal to prurient interest' and 'patently offensive' are also to be judged by contemporary community standards. Therefore the test of those terms, as applied to Count V, is to be judged with reference to the specified group which is found in this community."

Defendant contends that the wording of the statute specifically restricts the application of contemporary state standards to subsection (a) concerning "prurient interest" and not to subsection (b) concerning the question of "patent offensiveness." Defendant therefore claims that only the "prurient interest" element is to be judged by contemporary state standards and that "patent offensiveness" is not. Defendant gives us no standard by which to judge "patent offensiveness."

It is apparent that our legislature relied upon the United States Supreme Court case of Miller v. California, supra, in drafting Arizona's obscenity statute. In Miller, the United States Supreme Court stated:

"The basic guidelines for the trier of fact must be:

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest (citations omitted); (b) whether the work depicts or describes, in a patently offensive way, sexual conduct

> specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." 413 U.S. at 25, 93 S.Ct. at 2615, 37 L.Ed.2d at 431 (1973).

By this language alone it would not be unreasonable to restrict the contemporary community standard to the determination of "appeals to the prurient interest." The United States Supreme Court, however, continued:

> "Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. • • • " 413 U.S. at 30, 93 S.Ct. at 2618, 37 L.Ed.2d at 434.

Cf. Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966). See Mr. Justice Blackmun's statement in Smith v. United States, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977):

> "The phrasing of the Miller test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to

> the prurient interest is one such question. * * * . The Miller opinion indicates that patent offensiveness is to be treated in the same way. 413 U.S. at 26, 93 S.Ct. at 2616, 2618 * * * ." 431 U.S. at 301, 97 S.Ct. at 1763, 52 L.Ed.2d at 334, 335.

The only practical measure of what is "patently offensive" as well as what "appeals to the prurient interest" has to be measured not by a national standard but by contemporary community standards. Indeed, it may be impossible to require a jury to apply standards that exist beyond their particular community and in actual practice a contemporary state standard is actually the standard of the community from which the jury is drawn. In any event, it is not a national standard. Miller, supra.

We therefore hold that contemporary state standards, as set forth in the statute and contemporary community standards stated in Miller, supra, apply to a determination of what is "patently offensive" as well as what "appeals to the prurient interest." Roth, supra. We find no error.

The State's Closing Argument

The defense called Dr. Martin Blinder, a psychiatrist, to testify. Defense counsel and the prosecutor entered into a stipulation concerning Dr. Blinder's testimony:

> "The Court: For the jury's information, and with reference to Dr. Blinder's testimony, the parties have stipulated not to question Dr. Blinder on the broad issues connected with the obscenity of the five films solely because of the length of the trial. Consequently both parties have limited by stipulation their examina-

tion of Dr. Blinder to the issues surrounding the effect of sexually explicit materials. Is that correct?

"Mr. Hirsh: That is the stipulation, Your Honor."

No testimony was elicited from Dr. Blinder concerning the scientific value of any of the films.

On cross-examination and redirect, Dr. Blinder was asked and answered questions concerning the effect these films would have on people. The prosecutor stated in his closing argument:

> "As a matter of fact, you may choose to believe Dr. Blinder, who seemed pretty clear in his testimony, as I understood it, that is these movies don't do much for you, don't do much against you, they don't do much for you at all except cause people to act as they do. That is the best argument in the world that they have no serious scientific value. They are pretty much worthless, according to Dr. Blinder, who was brought here by Defense as a behavior modification expert."

Defense counsel objected to the argument, and in his motion for new trial urged that this argument violated the stipulation. We disagree. The terms of the stipulation in the instant case did not reach reasonable inferences which could be drawn from his testimony. Such inferences are ordinarily permissible. We find no violation of the stipulation. State v. Young, 109 Ariz. 221, 508 P.2d 51 (1973).

Affirmed.

JAMES DUKE CAMERON, Chief Justice

CONCURRING:

.....

FRED C. STRUCKMEYER,
Vice Chief Justice

.....

JACK D. H. HAYS, Justice

.....

WILLIAM A. HOLOHAN, Justice

.....

FRANK X. GORDON, JR., Justice

Opinion of the Superior Court of Maricopa County, Arizona Overruling Motion for New Trial

IN THE
SUPERIOR COURT
OF
MARICOPA COUNTY, STATE OF ARIZONA

Sept. 21, 1977 — HONORABLE STANLEY Z. GOODFARB
Date — Judge or Commissioner

CR 95002

STATE OF ARIZONA

vs.

ERLAND EARL BARTANEN

On September 13, 1977, this Court denied Defendant's Motion for a New trial, held an Aggravation and Mitigation Hearing, and Sentenced Defendant. In that minute entry, the Court noted that it would later set forth by opinion, it's basis for the denial of the Motion for a New Trial. Because of the nature of the issues raised in the case, which were reiterated in the Motion for a New Trial, this Court felt the basis for it's rulings should be stated explicitly.

This minute entry shall constitute that opinion and it shall become a part of the September 13, 1977 denial of the Motion for a New Trial by amendment and addition thereto.

Since the hearing of September 13, 1977, this Court has gone back and rechecked the file, all the instructions given and submitted, the Court's notes and the Reporter's Transcript on the points raised in the Motion, checked with the Clerk who wrote the June 8, 1977 minute entry regarding Exhibit 33 and who was present during final argument and submission of all Exhibits to the Jury for it's deliberations, and checked the authorities upon which the Court relied in determining it's rulings in this case and the instructions submitted. After such a recheck, this Court reaffirms it's denial of the Defendant's Motion for the following reasons:

1. *The Court did not err in it's instructions to the Jury in defining "prurient interest" or patently "offensive".*

Sections 1 and 2 of Defendant's Motion complain of the Court's instructions defining the above two terms. The Motion is devoid of authorities except one case, *City of Phoenix v. Fine,* 4 Ariz. App. 303, 420 P.2d 26 (1966). However, that case was decided many years before the present statute A.R.S. 13-531.01, 13-532, et seq. became effective. The instructions in our case were modeled almost verbatim from the instructions given by the Honorable David Perry in the case of *State of Arizona v. Richard Navarette,* CR 88946, which was affirmed by the Court of Appeals in ICA-CR 1978, July 6, 1977. However, as to the definition of the "prurient interest", this Court followed the majority definition cited with approval by *Frederick F. Schauer,* in his 1976 authoritative work, "The Law of Obscenity", pages 96 to 98. The Court also followed the approved definition of *Roth v. U.S.,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 149 (1957). The definition of that case followed by most Courts is Justice Brennan's definition found in foot note 20 of the case. See also specifically this Court's instruction, page 16, first paragraph and third paragraph thereof and

the case of *State ex rel Dowd v. "Pay the Baby Sitter,"* 31 Ohio MISC 208, 387 N.E. 2d 650, 654 (1972); *Schauer,* supra P 98.

As to the term "patently offensive" the Court again followed *Schauer's* statement of the term in his work on pages 102, 103, and all the cases cited therein, including the *Model Penal Code.* Interestingly enough, Defendant provides us no citation of authority for his position that this Court's instruction, page 16, last paragraph, is incorrect. Moreover, Defendant didn't even bother to submit a requested instruction on the definition of the term "patently offensive".

By any rational interpretation the Court's definition of the term "patently offensive" as used in A.R.S. 13-531.01 must include a measurement of the same by means of customary community standards of candor. Since the measuring device used for the consideration of the term "appeal to prurient interests" is contemporaneous community standards, it is only rational that the test of this second prong of the test, "patently offensive" also be measured by the same standards.

As to subsection (a) of Defendant's first argument, it is worth noting this Court, in defining the term "prurient interest" used nearly all of Defendant's requested instructions 14(b). See paragraph 3 of the Court's instruction, page 16. Also it paraphrased a great deal of the first sentence of Defendant's requested instruction 14 (a). However, the Court must admit that once Defendant saw what the Court was doing, he tried to withdraw the first sentence of his 14 (a) and all of 14 (b).

However, it really makes no difference from whose pen, the original of the Court's instruction were derived, Defendant has not shown they were incorrect, or if incorrect, how he was prejudiced by the instructions taken as a whole.

2. *The Prosecutor's argument as to Dr. Blender was invited, and not in violation of the stipulation.*

Dr. Martin Blender was the defense's last witness and his testimony was restricted to the behavioral effects of the films in question on viewers. This was agreed to by a stipulation read to the Jury which said:

> "Counsel stipulate not to question Doctor Blender on broad issues connected with the obscenity of the five films and limit examination of Doctor Blender to issues surrounding effect of sexually explicit material."

Nothing is contained in the stipulation as to limitation in argument as to the effect of Dr. Blender's testimony.

Dr. Blender testified consistently on direct and cross-examination that these films and films like it had no or almost no effect on the viewers behavioral characteristics except to provide some excitement and a sexual stimuli for emotional discharge through masturbation. Basically what he said was that for some people it provided a cheap kick.

Defense Counsel in final argument challenged the State to attack Dr. Blender. The State did not rise to the bait but argued somewhat logically, that Dr. Blender's testimony should be considered by the Jury when considering the third prong of the obscenity test, "Lack of Scientific Value." The State argued:

"As a matter of fact, you may choose to believe Dr. Blender, who seemed pretty clear in his testimony, as I understood it, that is these movies don't do much for you, don't do much against you, they don't do much for you at all except cause people to act as they do.

That is the best argument in the world that they have no serious scientific value. They are pretty much worth-

less, according to Dr. Blender, who was brought here by the defense as a behavior modification expert."

This Court does not find it a violation of the stipulation. Moreover our Courts have said in final argument Counsel is allowed broad latitude as long as no misstatement of fact and law is made. Furthermore, all reasonable inferences from the testimony may be drawn by either side. See *State v. Landrum,* 112 Ariz. 555, 544 P.2d 664 (1976); *State v. Taylor,* 112 Ariz. 68, 537 P.2d 938 (1975); *State v. Brooks,* 107 Ariz. 320, 487 P.2d 357 (1971) and the other cases collected under head note "Criminal Law" 713 in the Arizona Digest. Further for argument to be the basis for a new Trial, the argument must be so prejudicial as to have influenced the Jury Verdict. *State v. King,* 110 Ariz. 36, 514 P.2d 1032 (1973). The record here clearly indicates otherwise.

Defendant's argument as to the statement regarding Dr. Blender has no merit to it at all.

3. *The Newspaper Publicity argument is not supported by the record.*

Again, without citation of authority or references to the record Defendant claims news paper publicity prejudice. An examination of the stories attached as Exhibits shown none pertain to the present case, except one which appears on the afternoon of the second day the Jury was deliberating, one which came out after the Verdict and one discussing what witnesses testified to. No citation of authority is even necessary to answer this argument.

The Court does desire to clear the record as to the last paragraph of page 9 of the Motion. A Juror was contacted by a person she knew, who stated her son worked or had worked at the Owl Bookstore. She wanted the juror to talk

to her son. The Juror refused and reported the incident the next morning to the Court. The Court questioned the Juror and was specifically satisfied the Juror was not affected, and could continue as a Juror in the case without prejudice to either side. While the Court did not permit Defense counsel to cross examine her, the Court thought this request was totally inappropriate. Moreover, it would only prejudice the Defendant if allowed.

Moreover, Defendant made no Motion on the record as to a mistrial or otherwise. This section of Defendant's Motion is also without merit.

4. *Exhibit 33 was not excluded from Jury deliberation and even if excluded, the failure to submit it was not prejudicial.*

The minute entry of June 8, 1977, as to Exhibit 33 is wrong. After checking with the Clerk of that date, viewing the Exhibit slip for Exhibit 33, this Court is convinced beyond reasonable doubt the Exhibit was not withdrawn and did go into the Jury room during deliberation. That part of the June 8, 1977, minute entry to the contrary is stricken and deleted.

Since Counsel has chosen by it's Motion to raise the subject of Exhibits 33, 34 and 35, it is well to clarify the record as to what happened as to those Exhibits on the date of final argument, June 8, 1977. To do that however, it is only fair to point out, which Counsel for Defendant failed to do, that on the afternoon of June 7, 1977, the Court discovered that numerous markings and under-linings had been made in Exhibits 33, 34 and 35. None of this was authorized. Counsel were specifically ordered to erase all the markings or submit clean copies. This they specifically agreed to do on the record. However, the Court discovered,

the next day as the Clerk was preparing the Exhibits for submission to the Jury, that Counsel had failed completely to do it. The Defense then agreed to withdraw Exhibit 33. However, it was later reinstated when both Counsel advised the Court they stipulated that the marked Exhibits would go to the Jury room. After apologizing to the Court for failing to inform the Court of their stipulation to forego the Court's previous order, they requested Exhibits 33, 34, and 35 to go in as marked. The Court agreed, but the Clerk failed to correct her entry as to Exhibit 33. The Exhibit slip was re marked. The Clerk has advised this Court that all Exhibits, including Exhibit 33, did go to the Jury room.

Moreover, Exhibit 33 "The Hite Report" was only admitted as illustrative of one type of book currently available on the market for sale. The exhibitory record here was otherwise amply supplied with other books, magazines and materials of a sexually explicit character currently available for sale and on the market. Even if the "Hite Report" didn't get to the Jury room, it is difficult to see the prejudice to the case which requires a new Trial.

In this case the Jury saw all the films at least three times and probable a fourth time during deliberation. This latter statement is made since the Court itself made sure the projector was available during deliberation and working for the two different types of films involved. (super 8 M.M. and regular 8 M.M.). The Jury deliberated for three days and submitted a number of intelligent and rational questions indicating a considerate deliberation was being conducted. To suggest any of the points raised by Defendant prejudiced that deliberation is unsupported by the record and the facts.

The Jury's Verdict is well supported by just a viewing of the films, *State v. Navarette,* supra, and they saw them at least four times. The Court also previewed the same films on March 29, 1977, and on that basis denied a Motion to Dismiss and Suppress by six page minute entry on April 4, 1977.

The Motion for a New Trial has no merit and is denied therefore.

/s/ STANLEY Z. GOODFARB
STANLEY Z. GOODFARB, *Judge*

Opinion of the Superior Court of Maricopa County, Arizona Overruling Motions to Dismiss and to Suppress

IN THE
SUPERIOR COURT
OF
MARICOPA COUNTY, STATE OF ARIZONA

Apr. 4, 1977	HONORABLE STANLEY Z. GOODFARB
Date	Judge or Commissioner

CR 95002

STATE OF ARIZONA

—VS.—

ERLAND EARL BARTANEN

Defendant has been charged with five (5) counts of knowingly and commercially exhibiting obscene items, to wit: 8 MM Motion picture films, in violation of A.R.S. § 13-532 as amended in 1976. He is also charged under A.R.S. § 13-138, 139 and 140 as a "principal".

On March 17, 1977 Defendant requested a "Judicial Review" of the five films involved to determine whether or not the films were obscene, and therefore whether or not the seizure was violative of the first amendment. This Motion is tied to a Motion to Dismiss on the basis that if the Court finds, on viewing the same, that the films are not obscene, then they are protected by the First Amendment. The State had no objection to the "Judicial Review" and the review was done on March 29, 1977 in the com-

pany of both Counsel, and the seizing officers with a prior waiver of Court Reporter and Clerk.

In addition, on February 10, 1977, Defendant filed a Motion to Suppress the seizure of the films on the basis that the search warrant did not describe the films to be seized with sufficient particularity. Therefore, Defendant claims it was violative of the Fourth Amendment. A certified copy of the search warrant was filed with the Court and indicated the five films were described by location, length, color and sexual acts shown. Again a review of the films was necessary to consider defendant's position and so, therefore, the review of March 29, 1977 served two purposes: Consideration of the Motion to Dismiss and consideration of the Motion to Suppress.

A viewing of the five films indicated to the Court that Defendant's Motion to Dismiss must be denied. The films are all sexually explicit and appears intended to show as closely as possible intimate views of sexual organs, intercourse, fellatio, cunnilingus, masturbation, etc., etc. The camera angles, the closeness of view, the explicit views of the genitals, the lack of acting, the lack of plot, etc., etc., all clearly indicate the films fall within the definition, as far as this Court is concerned, for the purpose of the Motion to Dismiss, of "obscenity" under A.R.S. 13-532 and as defined by A.R.S. 13-531.01 sub section 2. The films on their face, in the opinion of this Court, appeal to the prurient interest, depict sexually activities in a patently offensive manner and to say the least, "lack serious literary, artistic, political or scientific value."

The more interesting question of the pending Motions is whether or not the search warrant described the films with sufficient particularity to overcome the claims of the Motion to Suppress. The warrant described each of the

films by location in the store referencing it to the projection booth where it is to be found. The warrant also indicates the view by the police officer affiant took place on the same day and afternoon of the seizure. It is apparent that the seizure took place within an hour or a few hours after the officers view. While the Motion claims films in projection booths are often switched, there is no claim here the films were switched between the time of the officers view and seizure or that the officers seized a film they had not previously seen and described in their affidavit.

In each case the films are described by type, 8 MM Motion Picture, length, and that they are in color. All of the films fulfill that category. However, none of the films are described by a title, or are the names of the actors set forth, or is the plot of the movie described. All that is used is a check list of the sexual acts to be seen in the film. Viewing of the films indicates none of the "actors" are identified. In three of the films there is no title to the movie. Two of the films do bear a title and they are "Nymphette Cookie Hustlers" and "Sextravaganza Cum." The latter film is clearly directed to homosexuals since only males appear therein and the basic format of the movie is to show vivid scenes of male masturbation.

To understand the difficulties of a particularized description in the search warrant it must be understood how the films are shown. They are each shown in a separate projection booth. The film is on a continuous loop and the viewers see two minutes of the film for his quarter. The two minutes starts where the last viewer left off. The viewer sees as much as he wishes depending on how many quarters he wishes to put in. This means however, that the next viewer may start his view in anyone of five or six

stopping places. Considering the almost total absence of plot in most of the films, and the short period any title is shown, (the purpose of the film is to get to the action) the lack of described plot and title is clearly understandable and non prejudicial.

While defendant is correct that a seizure of a film which might be protected by the First Amendment requires a search warrant with a particularized description, most of the cases are based upon very generalized descriptions, *Lee Art Theater v. Virginia,* 392 U.S. 636, 88 S.Ct. 2013 (1968, or cases where the description consisted only of the terms "obscene books, films and magazines" and zealous officers went in and cleaned out thousands of items, which they in their own minds decided were obscene. The case of *Commonwealth v. Doriaus,* 191 N.E. 2d 781 (Mass 1963) and *Commonwealth v. Jacobs,* 191 N.E. 2d, 873 (Mass 1963) are illustrative. The basic and leading case on the subject is *Marceus v. Search Warrants,* 367 U.S. 717, 81 S.Ct. 1708 (1961) in which 11,000 copies of 280 publications were hauled away in a truck on a warrant which only described the material as "obscene publications".

Ours is not such a case. Each film is described by length, type, location and content of the film. The lack of description of plot is clearly explained by a lack of plot in each film. While the four hetro sexual films have the faintest skeleton of a plot on which the varieties of sexual acts are being hung, the homosexual film is totally devoid of plot. It basically consists of pictures of young men masturbating themselves and others. To indicate its clear lack of plot, it is worth noting the grand finale of the film consists of a scene of mass masturbation and ejaculation. If sound had been added to this film and particularly a musical background, the only way the film could have

been worsened would be to have scored the scene to the finale of the "1812 Overture".

The other four films with their bare hints of a plot also were properly described in the search warrants. As stated in *People v. Bates,* 39 Ill App 3rd. 259, 350, N.E. 2d, 44, 48 (1976):

"A minute and detailed description of the property to be seized is not required, but the property must be so definately described that the officer making the search will not seize the wrong property (the warrant must give the officers) information by which he could select certain property within the description of the warrant and refuse to take other property equally well described in the warrant".

The description in *Bates,* supra, failed the test because it describes:

1. "Films contained in 23 projectors,"
2. "Films contained in packages, 19 in total", and
3. "Films located along East wall in book case in building, package, totalling 30 in number".

The failure was because it simply wasn't specific at all. In our case the search warrant gave specific locations, type of film, color, length of showing times and specific acts of a sexual nature shown therein. That is sufficient under the test of particularity. To require a description of the plots of plotless films would serve no constitutional purpose, be patently absurd and technical nit-picking.

In the case of *State v. Thompkens,* 263 S.C. 472 211 S.E. 2d 549 (1975), the Court also held a lack of description of the title of the film did not void the search warrant where the affidavit indicated the films location and contents with sufficient particularity. In that case the films

were 16 MM feature films entitled "The Kidnappers" and "Dirty Movie Makers" shown at a theater. In our case, these are 10 to 11 minute short clips of explicit sexual activity shown in individual projection booths in two minute spurts. Considering the nature of the films, their locations, the ability to view, etc., the descriptions are more than sufficiently particularized to meet the test of the Fourth Amendment.

The Motion to Dismiss and the Motion to Suppress are denied.

Excerpt From Petitioner's Appellate Brief Before The Arizona Supreme Court

IN THE
COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

No. 1 CA CR 2977

Appeal from

the Maricopa County Superior Court
Cause No. CR 95002

THE STATE OF ARIZONA,

Appellee,

—VS.—

ERLAND EARL BARTANEN,

Appellant.

BRIEF FOR APPELLANT

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Motion to Dismiss or Suppress Filed by Petitioner in the Trial Court

IN THE
SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA
NO. CR 95002

STATE OF ARIZONA,

Plaintiff,

VS.

ERLAND EARL BARTANEN,

Defendant.

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR JUDICIAL REVIEW OF MOVIES RELATING TO MOTION TO SUPPRESS

COMES NOW the defendant, ERLAND EARL BARTANEN, by and through his counsel undersigned, and requests this Court to dismiss the charges against him on the grounds and for the reasons that the films which he is charged with exhibiting are not obscene and are, therefore, protected under the First Amendment to the United States Constitution. In the alternative, the defendant requests the Court to suppress the films on the grounds and for the reasons that the films are not obscene and that, therefore, the search warrant which was issued for their seizure was illegal for want of probable cause.

Respectfully Submitted

HIRSH & SHINER, P.C.
Attorneys for Defendant

By /s/ ROBERT J. HIRSH
Robert J. Hirsh